SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a Transcript of record. Court of appeals, District of Columbia. April term, 1898. No. 804. No. 10, special calendar. Charles Winston, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed May 9, 1898.

1 In the court of appeals of the District of Columbia.

CHARLES WINSTON, APPELLANT, vs. THE UNITED STATES. } No. 804.

Supreme court of the District of Columbia.

THE UNITED STATES vs. CHARLES WINSTON. } No. 21574. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court February 10, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia, holding a criminal term, January term, A. D. 1898.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present—

That one Charles Winston, late of the District aforesaid, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at the District aforesaid, in and upon the body of one Emma Winston, she, the said Emma Winston, in the peace of God and of the said United States of America then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Charles Winston a certain pistol, of the value of one dollar, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Winston, in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Emma Winston, and that the said Charles Winston, with the leaden bullet aforesaid, out of the pistol aforesaid then and there, by force of the gunpowder aforesaid, by the said Charles Winston discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound her, the said Emma Winston, in and upon the right side of the head of her, the said Emma Winston, giving to her, the said
2 Emma Winston, then and there, with the leaden bullet aforesaid so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Winston in and upon the right side of the head of her, the said Emma Winston, one mortal wound of the length of one-half

of one inch and of the depth of two inches, of which said mortal wound she, the said Emma Winston, then and there instantly died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Charles Winston her, the said Emma Winston, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 21574. United States vs. Charles Winston. Murder. George N. Nicholson, M. P.; Elizabeth Johnson, William F. Osborn, M. P.; Blake Johnson, Lucy Nichols. A true bill. Wm. B. Gurley, foreman.

Supreme court of the District of Columbia.

SATURDAY, *February 12, 1898.*

The court resumes its session pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

UNITED STATES *vs.* CHARLES WINSTON. } No. 21574. Indicted for murder.

Comes as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia; and thereupon, the defendant being arraigned upon the indictment, he pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

1898, March 8.—Jury sworn and verdict guilty as indicted.

3 Supreme court of the District of Columbia.

FRIDAY, *March 18, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

UNITED STATES *vs.* CHARLES WINSTON. } No. 21574. Convicted of murder of Emma Winston.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorney, C. H. Turner, esq.; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his

said offence the said defendant be taken by the warden aforesaid to the common jail from whence he came, and there to be kept in close confinement, and that on Wednesday, the twenty-fifth (25th) day of May, A. D. 1898, he be taken to the place prepared for his execution within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day, he, the said defendant, be hanged by the neck until he be dead; and may God have mercy on his soul. And thereupon the defendant, by his attorney, prays an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

Filed Mar. 19, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES } *vs.* CHARLES WINSTON. } No. 21574. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal noted in open court of the supreme court of the District of Columbia on the 18th day of March, 1898, wherein Charles Winston is appellant and the U. S. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

4 Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal supreme court of the District of Columbia.] JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 19 day of March, 1898.

H. E. DAVIS,
Attorney for Appellee.

Memorandum.

1898, April 2d.—Leave to defendant to prosecute appeal without bond.
Filed May 4, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA } *vs.* CHARLES WINSTON, DEFENDANT. } Criminal. No. 21574.

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution, to maintain the issue on its behalf, introduced as a witness Elizabeth Johnson, who testified as follows:

That she lived at ≠ 521 3rd street southwest and lived there on the 13th day of December last. The defendant occupied an upstairs front

room in the same house with his wife, Emma Winston, now deceased; that on that morning the deceased came in at about 9 o'clock and went upstairs to her room, where the defendant already was; that all was quiet until after 12 o'clock noon, when witness heard a pistol shot, the sound coming from the said upstairs room; that witness then heard the voice of Emma Winston, crying out, "Lord, have mercy," and then witness heard two more shots and then ran out for a policeman.

And, further to maintain the issue on its part joined, the Government introduced Blake Johnson, who testified as follows:

That he is the husband of the last witness, a brother of the deceased, and lives at # 521 3rd street southwest; that on the 12 day of December he heard the defendant say to the deceased, "If those parties tell me that again, I will make you smoke;" and, further, that when the witness and defendant lived together in another house he heard the defendant say to the deceased, "I will kill you this night."

5 And, further to maintain the issue on its part joined, the Government introduced Larkin W. Glazebrook, who testified as follows:

That as deputy coroner he performed an autopsy on the deceased and found thereon three bullet wounds, one about one inch in front of the right ear, surrounded by a powder burn of about an inch in diameter. This bullet passed upward through the lower wall of the skull, penetrated the brain, and lodged just below the upper wall of the skull. The second wound was two and a half inches below the first wound; had a similar powder stain around it. This bullet passed under the skin and muscle upward and lodged about two inches above the right eye. Wound No. 3 was situated just above the lip, about a half inch to the right of the centre of the body. This entrance wound was surrounded by a powder stain of larger diameter. The bullet passed backward and lodged in the posterior pharynx. Wound No. 1 was a fatal wound. No. 2 was not a fatal wound. No. 3 was a dangerous and perhaps fatal wound. Death was caused by acute hemorrhage following gunshot wound of face and brain. On cross-examination witness stated that wound No. 3 would not necessarily produce unconsciousness, though it might do so.

And, further to maintain the issue on its part joined, the Government introduced Lucy Nichols, who testified as follows:

That she was a sister of the deceased, and that about the middle of *the* November, 1897, she heard defendant say to deceased, "God damn you; I will kill you yet;" and, further, defendant said, "When I die you will be dead, too."

And, further to maintain the issue on its part joined, the Government introduced Henrietta Adams, who testified as follows:

That she lived at # 519 3rd street southwest; that on Dec. 13 she was in the 2nd story front room, and at about half past 12 she heard the voice of Emma Winston, crying, "Don't, Charlie, don't; don't, Charlie, don't." Then witness heard shots, followed by a loud cry; then witness heard deceased cry, "Murder, murder." Witness heard 4 shots in all.

And, further to maintain the issue on its part joined, the Government introduced Jeremiah Dee, who testified as follows:

That defendant came to his place on 9th street on the morning of Dec. 13th and got a pistol which he had previously left there.

And, further to maintain the issue on its part joined, the Government introduced George W. Nicholson, who testified as follows:

That he was a policeman, and in the line of his duty was called to the house # 521 3rd street southwest at a little before one o'clock on Dec. 13; that he went upstairs to the front room; found the door fastened and broke it in. The room was quite dark, the curtains were down, and the room was filled with smoke; found the body of Emma Winston on the bed and the defendant in an unconscious condition, with his right
6 arm extended on the bed; a pistol lay about three or four inches from his right hand. He later sent the defendant to a hospital. The woman lay on her side, with her head against the wall and her head covered with blood; much blood on the floor, some on the wall, and the bedding stained with blood. The defendant was badly wounded; blood all over his hair and one eye was closed. Witness identified the pistol, in which there were four empty shells and one loaded shell. Deceased had on but little clothing, an undershirt and skirt, and the pistol when found was three or four feet from the head of deceased and about two feet from her hand.

And, further to maintain the issue on its part joined, the Government introduced Gustave A. Schrader, who testified as follows:

He was a policeman and was detailed Dec. 13th to the Emergency Hospital to guard Charles Winston; that on Dec. 16th Winston, who was badly wounded, rousing up, said, "I want to see my wife; I want to talk with her." Witness said, How is it you are here in the hospital? Defendant replied, "I shot myself." Witness asked defendant what he shot his wife for, and defendant said, "I thought I had killed her." Defendant also said he was jealous of his wife and of one Louis Hickman.

And, further to maintain the issue on its part joined, the Government introduced Margaret T. Dunn, who testified as follows:

That she was a nurse in the hospital and in attendance upon Winston, and while so in attendance heard the defendant say that he had shot his wife because he was jealous of her.

And, further to maintain the issue on its part joined, the Government introduced George A. Juneman, who testified as follows:

He was a surgeon at the Emergency Hospital and dressed Winston's wounds. Winston was suffering from gunshot wound in the right temporal region; ball supposed to be still in left upper jaw. He removed an eye.

And, further to maintain the issue on its part joined, the Government introduced William Vermillion, who testified as follows:

That he was a policeman detailed at the hospital to guard the defendant, and while there asked the defendant why he shot his wife, and defendant replied that he wanted to shoot both her and her lover.

And thereupon the Government rested.

And thereupon the defendant, to maintain the issue on his part joined, took the stand and testified on his own behalf as follows:

That he had been married six years and lived happily with his wife; that he had been in prison for two years for an assault with intent to kill, and in jail 6 months on a plea of simple assault on an indictment of assault with intent to kill, and in jail 3 months for threats to his wife. On the morning of Dec. 13 he came home at 9.30; his wife came in about eleven o'clock; that his wife accused him of running with women and said he had stayed with one the night before. His wife further said,
7 "You had better stay with me, Charlie. Some morning you will come home and find me dead." Defendant sat down in a chair and fell asleep and was wakened by the sound of a pistol shot, which seemed in the room. He asked his wife if she had heard the shot, and she said no, and his wife was then lying on the bed. Defendant approached the bed and leaned over; felt something pressed to his temple; a shot follows, and he fell to the floor wounded; heard thereafter two more shots and then became unconscious. He remembered nothing more for about a week. Witness testified: "I did not shoot my wife. I never told any one I did shoot my wife." On cross-examination witness testified when he went over to the bed his wife was lying on her left side and it was light in the room. The right side of her face was exposed to his view, and that he saw no wounds upon her.

And thereupon the justice, of his own motion, charged the jury as follows:

In the evidence in this case the circumstances are of such character that it will not be necessary for me to instruct you at any length. Therefore, I shall detain you but a very few minutes, and when I shall have concluded the entire responsibility of this case will rest upon you.

The indictment charges the defendant with the murder of his wife by shooting her with a pistol ball fired from a pistol in his hand on the thirteenth day of December, 1897. The indictment charges that this act was committed maliciously, wilfully, and of his malice aforethought, as these indictments ordinarily express it, so that the question for you to determine will be, whether this woman who was killed, as the evidence indicates beyond any doubt or question, by a pistol ball, was killed by her husband, the defendant, who is now on trial, or whether she committed suicide, as it is called, or perpetrated self-murder.

By the testimony it appears that the dead woman, the wife of this man, was a woman of small stature, and that she weighed about 105 pounds. There is no testimony in behalf of the prosecution which tends to show that immediately before the pistol was fired an altercation or struggle occurred between the defendant and his wife. We are entirely unenlightened, except by the testimony of the defendant, as to the circumstances that attended this shooting. It does not appear that there was any struggle, or that there was any altercation, between the defendant and his wife. The defendant does not claim that his wife assaulted him, or that she rendered him seriously angry, or that he fired this shot in the heat of passion. He says that everything was peaceful so far as their relations were concerned, except that his wife was jealous of him; that there was no antecedent struggle, and that he did not fire the fatal shot

at his wife, but that it must have been fired by her own hand; so that there is but one question here. It being undisputed that this woman was killed, that she was killed in that room, and that she was killed by a pistol ball, that question is, Who did it? Was it the act of the
8 defendant or was it the act of the deceased? If you believe from the evidence that the defendant did not fire this fatal shot, or if you believe from the evidence that the deceased woman took her own life, necessarily your verdict must be for the defendant, the verdict of not guilty; but if you believe beyond a reasonable doubt that this woman met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, I think that your verdict should be guilty as indicted, for there would be a presumption of malice arising from the fact that her death was accomplished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any palliating or mitigating circumstances, there could be but one reasonable inference from the fact of the shooting, and that would be that the act was committed with malice aforethought.

Malice may be indicated in various ways. It should be indicated by the testimony or by the evidence in some way in order to justify the verdict of guilty of murder. But the use of a pistol in such way as that its use may and does cause death, would be evidence of malice. Evidence of prior threats to take life would be evidence of malice. Evidence tending to show not one wound, but several wounds, tending to show a deliberate purpose to take life or accomplish death, would be evidence of malice. So that if you believe from the evidence, beyond a reasonable doubt, that this defendant killed his wife with a pistol, that he fired into her head three shots from that pistol, you would be justified in reaching the conclusion, in the absence of any circumstances showing mitigation of the crime or anything palliating it, that the defendant is guilty as indicted, and you would be required by your duty to return a verdict of guilty as indicted. The district attorney has adverted to what is called reasonable doubt, and he has explained it sufficiently, I think. Some of you who have performed jury duty before know that it does not mean any kind of doubt that a juror may entertain in his own mind, but that it means a doubt which arises out of all the circumstances in the evidence, and which the jury, after having considered and weighed all the evidence, reasonably entertain. When a jury shall have reached a conclusion amounting to a conviction—that is, when they shall have had their minds convinced by the evidence that a certain conclusion is right—then they are satisfied beyond a reasonable doubt. If you should be satisfied beyond a reasonable doubt that the defendant killed his wife with malice aforethought, you should return a verdict of guilty as indicted.

Now, you have been told, and it is the law since the act of Congress, passed in January, 1897, that a jury is authorized when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words "without capital punishment."

Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their

verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words without capital punishment, it is your duty so to do; but the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfullness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offense, palliating circumstances that tend to show that the crime is not heinous in its character, the jury may add the words "without capital punishment," and the law then makes the penalty imprisonment for life.

That qualification cannot be added unless it be the unanimous conclusion of the the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.

The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury that propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words "without capital punishment." In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the facts that you are brought here to try in this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification.]

Whereupon the defendant, by his counsel, then and there excepted to that part of said charge which related to the act of Congress approved Jan'y 15th, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and which portion of the said charge is inclosed in brackets above, and the trial justice noted the said exception upon his minutes before the jury retired to consider of its verdict.

And because the aforesaid exception, made and noted as aforesaid, does not appear of record, the defendant, by his counsel, prays the trial justice to sign, seal, and enrol' this, his bill of exceptions,
10 which is accordingly done, now for then, this 4th day of May, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 16, inclusive, are true copies of originals in case No. 21574, criminal, United States vs. Charles Winston, as the same remains upon the files and records of said court.

[Seal supreme court of the District of Columbia.]

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of May, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia supreme court. No. 804. Charles Winston, appellant, vs. The United States. Court of appeals, District of Columbia. Filed Apr. 9, 1898. Robert Willett, clerk.

11 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

12 CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

Mr. Chief Justice Alvey delivered the opinion of the court:

The appellant, Charles Winston, was indicted for the wilful murder of his wife, Emma Winston, by shooting into her head and face three pistol balls. He then attempted to take his own life, by shooting himself, but he failed to inflict a mortal wound. The murder was committed on the

13th of December, 1897, in a room on Third street, where the parties lived. The accused pleaded to the indictment not guilty, and was duly tried by a jury and convicted of murder as indicted, and was sentenced to be hung.

The facts as set out in the bill of exception are few, and show no circumstances whatever of provocation nor of the slightest mitigation of the crime. The only ruling of the court below to which exception was taken by the appellant was to that part of the charge to the jury that related to the application and construction of the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and the manner of presenting the consideration of the act to the jury.

It appears that it was contended by counsel for the accused, in their argument to the jury, that it was the duty of the jury to qualify their verdict, as authorized by the act of Congress, in every case of conviction for murder, and to declare the conviction to be "without capital punishment," without reference to the circumstances of the case. But this proposition was not acceded to by the judge in his charge. He said to the jury:

"Now, you have been told, and it is the law since the act of
13 Congress passed in January, 1897, that a jury is authorized, when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words 'without capital punishment.'

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,' it is your duty so to do; but the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfulness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumsteness which tend to mitigate the offense, palliating circumstances that tend to show that the crime is not heinous in its character, the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification can not be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury—cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The lawmaking power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury the propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words 'without

capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the facts that you are brought here to try in this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification."

It was to these portions of the charge that exception was taken by the appellant; but it is clearly apparent that the question whether the verdict should be guilty as indicted or guilty "without capital punishment" was fully and clearly submitted to the consideration of the jury on the facts of the case. The jury were left entirely free to adopt the one form of verdict or the other, as their judgment might approve.

We have, in the preceding case of Strather *v.* United States, ante, p. , considered fully the question of the application of the act of Congress of January 15, 1897, and the question as to how far the court can instruct the jury as means of aiding and enlightening them in determining the form of their verdict in reference to the statute. We do not deem it necessary to repeat what we have said in that case. The decision in that case fully covers the question presented in this as to the application, the construction, and the right and power of the court to instruct the jury and the circumstances that should be considered by the jury in determining the question as to the form of their verdict under the act of Congress of January 15, 1897.

We think the exception taken was without sufficient ground to support it, and, therefore, the judgment appealed from must be affirmed; and it is so ordered.

Judgment affirmed.

14 WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES; } No. 804.

Dissenting opinion by Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder, "the jury may qualify their verdict by adding, 'without capital punishment.'"

In my opinion, the language of the act is plain, and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind, it appears plain that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

15 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power, notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

16 Court of appeals of the District of Columbia. April term, 1898.

CHARLES WINSTON, APPELLANT, vs. THE UNITED STATES. } No. 804.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the district of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.

Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the District of Columbia. April term, 1898. No. 804. Judgment. Court of appeals, District of Columbia. Filed Jun' 7, 1898. Robert Willett, clerk.

17 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 16, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of Charles Winston, appellant, vs. The United States, No. 804, April term, 189 , as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

18 (Indorsement on cover:) Case No. 17016. District of Columbia court of appeals. Term No., 431. Charles Winston, petitioner, vs. The United States. Filed October 11, 1898.